No. 80-83

In the Supreme Court of the United States

OCTOBER TERM. 1980

EDMUND S. MUSKIE, SECRETARY OF STATE,
PETITIONER

v.

PHILIP AGEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Dayton v. *Dulles*, 357 U.S. 144 3

Diamond v. *Chakrabarty*, No. 79-136 (June 16, 1980) 5

FTC v. *Dean Foods Co.*, 384 U.S. 597 5

Kent v. *Dulles*, 357 U.S. 116 ..... 3, 5

United States v. *Wise*, 370 U.S. 405 5

Wong Yang Sung v. *McGrath*, 339 U.S. 33 5

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 4

Statutes:

Act of May 22, 1918, ch. 81, Section 2, 40 Stat. 559 4

Passport Act of 1926, 22 U.S.C. 211a 4, 5

Miscellaneous:

56 Cong. Rec. 6066-6067 (1918) 4

Denial of Passports to Persons Knowingly Engaged in Activities Intended to Further the International Communist Movement: Hearings of H.R. 13760 Before the House Comm. on Foreign Affairs, 85th Cong., 2d Sess. (1958) 5-6

H.R. 13652, 85th Cong., 2d Sess. (1958) 6

H.R. 14895, 89th Cong., 2d Sess. (1966) 6

H.R. 5615, 96th Cong., 2d Sess. (1980) 6

Page

Miscellaneous—Continued:

Passport Legislation: Hearing on S. 806, S. 1973, S. 2287 and S. 2315 Before the Senate Comm. on Foreign Relations, 86th Cong., 1st Sess. (1959) 6

Passport Legislation: Hearings on S. 2770, S. 3998, S. 4110, and S. 4137 Before the Senate Comm. on Foreign Relations, 85th Cong., 2d Sess. (1958) 6

Proposed Travel Controls: Hearings on S. 3243 Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. (1966) 6

Providing Standards for the Issuance of Passports and for Other Purposes: Hearings on H.R. 9069 Before the House Comm. on Foreign Affairs, 86th Cong., 1st Sess. (1959) 6

S. 4110, 85th Cong., 2d Sess. (1958) 5

S. 806, 86th Cong., 1st Sess. (1959) 6

S. 2095, 86th Cong., 1st Sess. (1959) 6

S. 2216, 96th Cong., 2d Sess. (1980) 6

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 80-83

EDMUND S. MUSKIE, SECRETARY OF STATE,
PETITIONER

v.

PHILIP AGEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

---

1. Respondent erroneously asserts (Br. in Opp. 4) that he "never made any 'express concession that his international travel activities have caused and probably will continue to cause serious damage to the nation's security or foreign policy.' " As both courts below concluded, however, respondent "concedes that his activities are causing and likely to cause serious damage to the national security or foreign policy of the United States" (Pet. App. 94a, 3a-4a, 17a). Their concurrent conclusion on this point is based on the unequivocal statements made by respondent's counsel before the district court on January 3,

1980.[1] Accordingly, respondent may not now be heard to suggest that this Court must consider him to be merely an innocuous "journalist and author specializing in matters of international politics" (Br. in Opp. 7).

---

[1]The following colloquies occurred before Judge Gesell (C.A. App. 16-17, 29, 30):

THE COURT:	In other words, you are prepared to concede that your client is causing or is likely to cause serious damage to the national security and you want to just test the regulations?
MR. WULF:	Yes. * * *
THE COURT:	And, therefore, the factual issues of whether [respondent] was causing or likely to cause serious damage to the national security would be conceded.
MR. WULF:	I would—in fact * * * I would concede it for purposes of the preliminary injunction, yes.
THE COURT:	You concede it for purposes of the determination of the validity of the regulation.
MR. WULF:	Yes, I think even under those circumstances the Secretary of State cannot on his own discretion revoke a passport. * * *
THE COURT:	I understand that legal position but I wanted to be sure when you said there were no facts in dispute that my approach would be in terms of an assumption, underlying factual assumption.
MR. WULF:	I would concede that, Your Honor.

* * * * *

MR. WULF:	[W]e will argue just that question [authority to adopt the challenged regulation] and we will concede the charges as they are made in the letter to [respondent], which is part of the record.
THE COURT:	Right.
MR. WULF:	O.K. Whatever they charge, we will concede it is true.

2. In light of respondent's express concession, this case presents the fundamental and important issue whether the Executive may revoke the passport of a citizen whose international travels are causing serious damage to the foreign policy and national security of the United States. Respondent argues that the prior decisions of this Court control this question and that in any event the legislative history shows that Congress has repeatedly determined to deny the Executive the power to revoke passports in the circumstances presented by this case. As we briefly demonstrate below, these claims are without merit.

a. Respondent asserts (Br. in Opp. 18-20) that *Kent* v. *Dulles*, 357 U.S. 116 (1958), and *Dayton* v. *Dulles*, 357 U.S. 144 (1958), are directly on point and that "[a] decision for the Secretary here would require overruling *Kent* and *Dayton*" (Br. in Opp. 20). But both *Dayton* and *Kent* involved only the question whether the Secretary could deny passports to individuals solely on the basis of their communistic beliefs and associations, and not whether the Secretary could act to protect the national security and foreign policy of the United States. See 357 U.S. at 117-120; *id.* at 150-153. Here, of course, respondent concedes that his international travels are

---

THE COURT: For purposes of challenging the regulation.

* * * * *

GOV'T COUNSEL: [A]s I understand it, there is a concession for purposes of all of the arguments that he has raised, all of the claims in his complaint that [respondent's] conduct clearly falls within the coverage of the regulation, that is, his activity is likely to cause or does cause damage to the national security.

THE COURT: Yes, as you have set it out in your letter to him [revoking his passport].

GOV'T COUNSEL: Yes.

MR. WULF: Yes. That is agreed then.

causing and would continue to cause serious damage to the foreign policy and national security of the United States.[2]

b. Respondent also erroneously suggests (Br. in Opp. 20-24 & n.7) that Congress has affirmatively and repeatedly denied the Executive the power to revoke or deny passports on foreign policy and national security grounds. In 1918, Congress for the first time required American citizens to have a passport in order to enter or leave the United States. See Act of May 22, 1918, ch. 81, Section 2, 40 Stat. 559. Contrary to respondent's assertion (Br. in Opp. 22-23), the legislative debates regarding this wartime measure were premised on the existence of the Executive's authority to deny or revoke passports on national security grounds.[3] Indeed, as we pointed out in the petition (see Pet. 14-15), the passport control legislation enacted in 1918 would have been largely ineffectual without such authority over the issuance of

---

[2]Moreover, since the Secretary's claim of authority is based on the broad language of the Passport Act of 1926, 22 U.S.C. 211a, and not merely on the Executive's inherent authority, respondent's reliance (Br. in Opp. 20) on *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), is misplaced.

[3]Respondent states that Representative Flood, the sponsor of the 1918 legislation, "pointed out that the Secretary of State was not then authorized to revoke passports on national security grounds" and "specifically noted that the national security revocation authority claimed at that time was contrary to law, and could not be upheld" (Br. in Opp. 22 & n.8, 25 n.10, citing 56 Cong. Rec. 6066-6067 (1918)). The floor debate cited by respondent does not support these claims. Rather, Rep. Flood stated only that Congress had not required an American citizen to have a passport as a prerequisite for entering or leaving the country and that, as a result, the government's rules and regulations regarding travel without a passport were inadequate and possibly invalid. Rep. Flood did not suggest that the Secretary lacked power to deny or revoke passports on appropriate grounds. See 56 Cong. Rec. 6066-6067 (1918).

passports. And any doubt on this point was eliminated eight years later, when Congress broadly provided that "[t]he Secretary of State may grant and issue passports * * * under such rules as the President shall designate and prescribe for and on behalf of the United States * * *." Passport Act of 1926, 22 U.S.C. 211a.

Similarly, the Executive's attempt following the adverse decision in *Kent* to codify its authority in this area[4] does not demonstrate that the Executive previously lacked power to revoke passports for national security and foreign policy reasons. It is well settled that the Executive does not "admit[] that it is acting upon a wrong construction by seeking ratification from Congress." *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47 (1950). See also *United States* v. *Wise*, 370 U.S. 405, 411 (1962); *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 608-611 (1966). That principle is particularly apposite here. Notwithstanding respondent's contrary assertion (Br. in Opp. 20-21 n.7), the officials who have testified before Congress regarding the government's passport authority have uniformly indicated that the Executive has the authority to revoke passports on national security and foreign policy grounds.[5] Furthermore, just as Congress failed to act on

---

[4]See S. 4110, 85th Cong., 2d Sess. (1958); Pet. App. 12a n.4. The legislative debate regarding this proposal focussed primarily on overruling *Kent* and permitting the Secretary to deny passports to communists. In these circumstances, there is no adverse inference regarding the Executive's authority in the area of national security. Cf. *Diamond* v. *Chakrabarty*, No. 79-136 (June 16, 1980), slip op. 10.

[5]For example, the State Department's Legal Adviser testified in 1958 that the authority to revoke passports on national security and foreign policy grounds is "a constitutional correlative of power to conduct foreign relations and to maintain the security of the United States * * *" and was "not in any way affected by the Supreme Court decision" in *Kent*. *Denial of Passports to Persons Knowingly Engaged in Activities Intended to Further the International Communist*

an administration proposal to codify its powers,[6] so too Congress declined subsequent to *Kent* to enact proposed legislation that would have severely limited the President's authority regarding the revocation of passports on foreign policy and national security grounds.[7] See, *e.g.*, H.R. 13652, 85th Cong., 2d Sess. (1958); S. 806 and S. 2095, 86th Cong., 1st Sess. (1959); *Denial of Passports to Persons Knowingly Engaged in Activities Intended to Further the International Communist Movement: Hearings on H.R. 13760 Before the House Comm. on Foreign Affairs*, 85th Cong., 2d Sess. 94-97 (1958); *Passport Legislation: Hearing on S. 806, S. 1973, S. 2287 and S. 2315 Before the Senate Comm. on Foreign Relations*, 86th Cong., 1st Sess. 3-6 (1959).

Movement: Hearings on H.R. 13760 Before the House Comm. on Foreign Affairs, 85th Cong., 2d Sess. 7 (1958). See, *e.g.*, *Passport Legislation: Hearings on S. 2770, S. 3998, S. 4110, and S. 4137 Before the Senate Comm. on Foreign Relations*, 85th Cong., 2d Sess. 23 (1958); *Passport Legislation: Hearing on S. 806, S. 1973, S. 2287 and S. 2315 Before the Senate Comm. on Foreign Relations*, 86th Cong., 1st Sess. 58, 62 (1959); *Providing Standards for the Issuance of Passports and for Other Purposes: Hearings on H.R. 9069 Before the House Comm. on Foreign Affairs*, 86th Cong., 1st Sess. 8, 178 (1959). See also *Proposed Travel Controls: Hearings on S. 3243 Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 72 (1966) (Acting Administrator of the State Department Bureau of Security and Consular Affairs testified that in accordance with prior practice "we are working under a reguiation which says that whenever we believe it is in the national interest to deny or revoke a passport we have the authority to deny or revoke it").

[6]See note 4, *supra*. See also H.R. 14895, 89th Cong., 2d Sess. (1966).

[7]Respondent suggests (Br. in Opp. 28) that Congress is currently considering legislation that would resolve the statutory questions in this area. But S. 2216, 96th Cong., 2d Sess. (1980), and H.R. 5615, 96th Cong., 2d Sess. (1980), solely concern criminal prosecutions for unauthorized identification of covert intelligence agents and sources. This proposed legislation does not address the important passport control issue posed by this case.

For these reasons and the reasons stated in the petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

WADE H. McCREE, JR.
Solicitor General

SEPTEMBER 1980

DOJ-1980-09